IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 03/12/2003

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THE HONOURABLE MR.JUSTICE A.K.RAJAN

Second Appeal No.5 of 1993

1. Arunachalam Pillai
2. Sundaram Pillai ... Appellants

-Vs-

Sorimuthu Pillai ... Respondent

Appeal against the judgment and decree dated 24.01.1990 made in A. S.No.21 of 1987, on the file of the Court of the Subordinate Judge, Tenkasi, against the Judgment and decree dated 29.08.1986, made in O.S.No.520 of 1981 on the file of the District Munsif, Ambasamudram.

!For appellant : Mr.T.M.Hariharan

^For Respondents : Mr.R.Loganathan

:ORDER

This second appeal has been filed against the judgment and decree dated 24.01.1990, in A.S.No.21 of 1987, on the file of the Court of Subordinate Judge, Tenkasi, reversing the Judgment and decree in O.S.No.520 of 1981 dated 29.08.1986, on the file of the District Munsif, Ambasamudram.
2. The plaintiff filed a suit for a declaration that pathway referred to in the plaint as BEFGC as a common pathway and consequentially for permanent injunction not to interfere with the plaintiff's use of the pathway. The case of the defendants is that it is not a common pathway but it is exclusive property of the defendants. On the basis of the evidence adduced, the trial Court found that the property referred as BEFGC is not a common pathway and dismissed the suit On appeal, the first appellate court reversed the Judgment of the trial Court and decreed the suit as prayed for.

3. Aggrieved against the Judgment and Decree of the first appellate court, this second appeal has been filed. The substantial question of law framed in this second appeal is as follows:
"Whether the decree of the lower appellate Court is legally sustainable in the light of the recitals in Ex.A.1 and the admission of P.W.1 that no right of way is given to him under Ex.A.1 and even the measurements of the suit II Schedule property are not given thereunder?"

4. The learned counsel appearing for the appellant submitted that the appellate Court had come to the conclusion that it is a common pathway, on the basis of the recital in the documents of the defendants to which the plaintiff was not a party. Further the appellate Court relied only on the Commissioner's report and found the pathway as common pathway.

5. The trial Court has found that the plaintiff claims ownership in the second schedule property (the pathway); he is not asking for easementary right over this property. The trial Court has found that the plaintiff's father who had purchased the schedule-1 of the suit property by the sale deed Ex.A.1 dated 29.10.1931 from Sankaravadivammal. The suit pathway, (the suit second schedule property) is referred to in Ex.B.2 as ABCD. The partition deed between the plaintiff and his brothers and father is Ex.A.3. In Ex.A.1, the second schedule property is not included. Further the second schedule property has not been conveyed to anyone in the partition deed Ex.A.3; No one has been given the right of pathway over this second schedule property. In Ex.A.1, the second schedule suit property is shown as Western boundary of the property conveyed and it is referred to as "v';fs; tifawh bghJeil ghijf;F fpHf;F". It is also admitted by the plaintiff that in Ex.A.1, it is not stated that the right of pathway is granted over second schedule property.

6. From the admission of the plaintiff, the trial Court found that over the second schedule property neither the plaintiff nor his father had any interest. In the plaint also, the plaintiff has not stated that he claims ownership in the second schedule property. But, he claims only the right of pathway over the property. Further the first defendant's father had purchased by a sale deed dated 01.01.1945, the property in second schedule from Pondikannu Pillai, S/o. Ramalingam Pillai. When the plaintiff claims easementary right, he must admit that it is the property of another person. When he claims ownership on the same property, he cannot claim easementary right. But, the plaintiff has admitted that his claim is only for ownership and not for easementary right. Therefore, the plaintiff must prove ownership. But, the documents filed on the side of the plaintiff does not refer to the pathway; it has not been referred even in the partition deed. The trial Court found that the plaintiff failed to prove their case and hence dismissed the suit.

7. The appellate Court reversed the finding of the trial Court on the ground that the dismissal of the suit for the inconsistent plea in the plaint is not sustainable. It held that the plaintiff sought for relief that he has a right to approach his property through the second schedule property; He has not asked for ownership of the entire second schedule property and therefore only consideration should be as to whether there is easementary right for the plaintiff.

8. The appellate court finds that at the time of purchase of the property through Ex.A.1, the plaintiff had no property on the east of the first schedule property. He had to approach from the northern side to the first schedule property only through the second schedule property. Therefore, in Ex.A.1, it is stated that they have to reach the first schedule property through the second schedule property. For that the appellate Court refers to

the Commissioner's report and the sketch. The appellate Court has also found that the plaintiff is not asking for easementary right over the entire pathway, but only for the purpose of going to the first schedule property. Therefore, the appellate Court had found that from the east-west road on the northern side, the plaintiff has to proceed through the second schedule property and reach the first schedule property.

9. This reasoning of the first appellate Court is not legally sustainable. There is no evidence to arrive at this conclusion. The conclusion of the first appellate Court is based on 'no evidence'. The Commissioner's report only shows the physical features; how the property situate. From that, the Court cannot come to the conclusion that the plaintiff used the pathway (the second schedule property) to reach the first schedule property. It is nothing but surmises and imagination by the first appellate Court. To succeed in the case, the plaintiff must adduce evidence and prove his case that he got a right of pathway over property referred as BEFGC. It is a well established principle that the plaintiff must win or fall on his own pleadings and evidence. But, in this case, there is absolutely no evidence adduced by the plaintiff to prove his case either of ownership of the second schedule property or easementary right over the same. Merely on the basis that the plaintiff had no property on the eastern side of the 1 st schedule property on the date when he purchased the same, the first appellate Court had come to the conclusion that the plaintiff had used the second schedule property to reach his land. This conclusion is not legally sustainable. It is for the plaintiff to prove his case which the plaintiff failed to do.

10. A perusal of the evidence adduced as extracted by the trial Court would show that the plaintiff's case is inconsistent; the plaintiff claimed ownership over the second schedule property and not easementary right. The trial Court had rightly found that the plaintiff has not proved their case. The basic document through which the plaintiff claims title is Ex.A.1. In that, the four boundaries of the first schedule property has been referred as follows:

"South of Ramalingam Pillai's land, North of Ramalingam Pillai's land, West of Ramalingam Pillai's common wall. East of their common pathway (v';fs; tifawh bghJeil ghijf;F fpHf;F)".
From this, it is clear that the property conveyed under Ex.A.1, situates on the east of "vendors common pathway". It does not convey the right of access or passage in that pathway. The plaintiff now claims the right of passage in that pathway. For that, it should be proved by evidence that the plaintiff prescribed easementary right. But, the plaintiff admits in evidence that he claims only proprietary right in that pathway and not easementary right. Therefore, the plaintiff has to fail; since he has not proved title over the pathway. The trial Court has rightly concluded that the plaintiff did not prove his case. The first appellate Court reversed that well considered Judgment based on irrelevant consideration. Therefore, the Judgment of the appellate Court is liable to be set aside and hence set aside.

11. The plaintiff can not be permitted to raise inconsistent pleas.

To claim easement, the defendant must admit the title of the defendant over the property. If the plaintiff claims easementary right that must be proved by sufficient evidence by the plaintiff. When the plaintiff admits that he claimed ownership and not easement and if he fails to prove ownership, he cannot be allowed to prove easementary right. Ownership and easement are mutually ex exclusive. Both cannot be pleaded. Therefore, when the plaintiff claimed ownership, he gives up the plea of easementary right. Ultimately, when the plaintiff failed to prove ownership, he cannot revive the plea of easement. In such circumstances, the plaintiff is not entitled for any relief. The trial Court approached the issue rightly and dismissed the suit. The reversal of the suit by the appellate Court is erroneous.

12. In the result, the second appeal is allowed. The Trial Court Judgment and decree is restored. The substantial question of law is answered in favour of the appellant. With costs.

Index:Yes
Internet:Yes

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